

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Retention by Broadcasters of) **MB Docket No. 04-232**
Program Recordings)
)

JOINT COMMENTS

TO: The Federal Communications Commission

Sierra Broadcasting Company, the licensee of Station KRNVT(TV), Reno, Nevada [Facility ID 60307]; Lane County School District 4J, the licensee of Stations KAVE(FM), Oakridge, Oregon [Facility ID 59346], KMKR(FM), Oakridge, Oregon [Facility ID 132574], KRVM-AM/FM, Eugene, Oregon [Facility IDs 54009 and 59340 respectively], and KSYD(FM), Reedsport, Oregon [Facility ID 59341], South Sound Broadcasting, LLC, the licensee of Stations KAYO-FM, Elma, Washington [Facility ID 33622] and KFMV-FM, Raymond, Washington [Facility ID 51167]; Snyder Broadcasting, Inc., the licensee of Stations KSNV-FM/AM, Snyder, Texas [Facility ID 60711 and 60710, respectively]; Mojave Broadcasting Company, the licensee of Station KMCC(TV), Laughlin, Nevada [Facility ID 41237], Rocky Mountain Broadcasting Company, the licensee of Station KMTF(TV), Helena, Montana [Facility ID 68717], and Bethesda Christian Broadcasting, Inc., the licensee of Stations KLGH(FM), Rapid City, South Dakota [Facility ID 88452], KSLT(FM), Spearfish, South Dakota [Facility ID 5475],

Comment: FCC Format Rules: §1.47 (p. 98)

Left margin = 1-1/2" wide
Double spaced
No requirement for top/bottom margins
Special rules if two-sided [JDM says don't do this]
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Summary if over 10 pages

BRIEFS HAVE DIFFERENT REQUIREMENTS (see §1.50)

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NOTE: Case No. Line must be on Line 15.6 in order for there to be the required 2" for court stamp

KLGH-1(FM), Rapid City, South Dakota [Facility ID 161655] and KLMP(FM), Rapid City, South Dakota [Facility ID 21637], collectively the “Licensees”, through counsel in this matter and pursuant to §§1.415 and 1.419 of the Commission’s rules, the Licensees submit their Comments in response to the Commission’s *Notice of Proposed Rulemaking* proposing that all broadcasters be required to record all of their programming aired between 6:00 a.m. and 10:00 a.m. of each broadcast day. The proposal also suggests the Commission will consider extending this requirement to twenty-four (24) hours a day, seven (7) days a week. As shown below, the Licensees respectfully submit their opposition to this proposal on grounds it is an overbroad reaction to a very limited problem; that it bears no reasonable relationship as a solution to a problem which is already policed at a rate of near one hundred percent (100%) perfection.

THE PROPOSAL

The Commission proposes that the daily taping requirement of such material would extend from 6:00 a.m. to 10:00 p.m., “. . . when children are likely to be in the audience . . .”. The Commission’s rationale for proposed taping requirement is the alleged difficulty it encounters in establishing a full record to prosecute complaints about obscene, indecent and profane broadcasts. Specifically, it points to instances where it has been unable to process such complaints because of the lack of a sufficient record to determine whether or not enforcement action is required. The basis of this perceived need was the inability to process 169 complaints out of 14,379 complaints received during the three-year period between 2000 and 2002. Thus, based on an inability to

process one percent (1%) of some 14,000 obscenity/indecency complaints, the Commission seeks to impose an unduly burdensome and punitive recording requirement on some 17,960 broadcast stations. This total not only includes some 2,500 educational FM stations, but some 380 educational television stations as well as almost 900 religious stations. In addition the recording requirement would be imposed on over 2,100 low power television stations. Although the proposal is silent on the matter, it presumably would apply to the several hundred low power FM stations that have been authorized or licensed by the FCC. In short, upwards of 18,500 broadcast stations would be imposed with this recording requirement.¹

The Proposal Is an Unjustified Burden

While many television stations have already invested heavily in digital equipment, the radio industry has not been as quick to follow. Cost estimates from radio licensees indicate that necessary equipment required to adhere to such a proposal will vary from approximately \$1,500 to over \$5,000. For television stations, most of which are now operating in the digital mode, the cost increases to comply with mandated recording are estimated at approximately \$5,000 per channel for each station. The associated administrative costs of storage and staff time will easily add another annual cost of

¹In the Initial Regulatory Flexibility Analysis attached to the rulemaking proposal (*see* Appendix A), the Commission noted the rule would apply to nearly 4,500 television stations and some 11,000 radio stations. However, since the proposal would apply to all radio stations, which is defined to include religious, educational and other radio stations, it is clear the proposal rule would also be applicable to some 2,500 FM Educational stations and another 500 low power FM stations which have recently been licensed or authorized. Thus for the sake of 169 complaints, the Commission proposes that almost 18,00 stations be required to record their programming 16 hours per day, seven days a week, 365 days a year.

\$5,000-\$7,500 per station. Given the *de minimus* nature of the problem of prosecuting indecency/obscenity complaints, these costs are simply disproportionate to the benefit sought, particularly for the small market broadcasters.

The Recording Requirement is Unduly Broad and Unnecessary

Purportedly the Commission has proposed the recording requirement in an effort to increase its effectiveness in enforcing its rules governing indecent program content. Yet the very statistics the Commission relies upon demonstrate that it has been overwhelmingly successful, processing some ninety-nine percent (99%) of its indecency/obscenity complaints. Thus for purposes of bridging a one percent (1%) gap, it would require some 18,500 broadcast stations to spend millions of dollars in equipment and personnel to reach closure on a category of unsupported complaints which averaged fifty-five (55) per year during the 2000-2002 period. Moreover, there is no indication nor reason suspect that these 169 non-prosecuted complaints would have been found indecent or obscene. In fact, the number of FCC indecency determinations made on the other 14,210 complaints during this period (approximately 20) would argue against any such finding on the 169 complaints the Commission was unable to prosecute. Under these circumstances, the Commission's proposal is simply unjustified overkill.

The Commission has provided no demonstrable need for the proposed recording requirement. To the contrary, the Commission's recent well-publicized record shows that it has not only been aggressive in enforcing indecency/obscenity rules, but that it intends to "take additional steps to sharpen [its] enforcement blade by increasing the burden on

stations to disprove indecency allegations and by significant increases in the fines for even the single utterance of an indecent word within a single program.²

The Commission's current processing standards on obscenity/indecency complaints demonstrate that mandated recording is not warranted. Under the Commission's current standards the complainant need only submit a "significant" excerpt of any material in question. While in a rare instance a tape of content might assist the prosecution of a complaint, the record shows it to be unnecessary.³ And clearly the "rare instance" does not justify such a sweeping and punitive requirement.

The Recording Proposal Is an Overreaction to a Limited Problem

The Licensees do not deny that obscenity/indecency programming occasionally occurs over the airways. However, the vast majority of the indecency complaints stem from very limited sources: radio talk shows (almost all of which are syndicated), and a very limited number of network entertainment programs. These are not the fare of educational, public affairs, religious or local programming. Given the sources of the offending programs, transcripts and tapes are already available. In almost all instances.

²See the testimony of Chairman Michael K. Powell before the United States Committee on Commerce, Science and Transportation, February 11, 2004.

³In the *MSFM Licensee Corp. of Chicago* Forfeiture Order, 17 FCC Rcd 493 (E.B. 2000), the Enforcement Bureau found that a complainant who provided only a brief description of only a few words of the broadcast was sufficient to support a finding of indecency.

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While the Commission may receive a high volume of complaints, in almost all cases they will all relate to a single program or episode from a handful of program sources -- sources which invariable have tapes, transcripts or digital recordings of the allegedly offensive material.⁴ Given that almost all complaints involved a network or syndicated program, there is absolutely no need for a recording requirement to be imposed on all broadcasters. Clearly there was no problem in obtaining a recording of that incident.

CONCLUSION

In view of the above, the Licensees, through their counsel, respectively request the Commission to decline the proposed recording requirement, as it is both unnecessary and unjustified.

Respectfully submitted,

SIERRA BROADCASTING COMPANY
LANE COUNTY SCHOOL DISTRICT 4J
SOUTH SOUND BROADCASTING, LLC
SNYDER BROADCASTING, INC.
MOJAVE BROADCASTING COMPANY
ROCKY MOUNTAIN BROADCASTING COMPANY
BETHESDA CHRISTIAN BROADCASTING, INC.

By _____
J. Dominic Monahan, Counsel

⁴In the recent, and perhaps most publicized incident, the Commission received over half a million complaints regarding the "wardrobe malfunction" of Janet Jackson on the Superbowl half-time show in January of 2004. However, there was no problem securing a tape of this incident.